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No. —

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IN THE  
**Supreme Court of the United States**  
October Term, 1983

TRANSPORT WORKERS UNION OF  
AMERICA, AFL-CIO,

*Petitioner,*

*v.*

CIVIL AERONAUTICS BOARD,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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93 pp



## QUESTION PRESENTED

1. Has the United States Court of Appeals for the District of Columbia ("Court") permitted the CAB<sup>1</sup> to usurp the exclusive jurisdiction of the NMB to

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- <sup>1</sup> When used in this brief, the organizations and documents listed below will be abbreviated as follows:

<u>Unions</u>	<u>Abbreviations</u>
Transport Workers Union of America, AFL-CIO	TWU
International Association of Machinists and Aerospace Workers	IAM
International Brotherhood of Teamsters	IBT
Air Line Employees Association	ALEA
<u>Employers</u>	
Pan American World Airways, Inc.	Pan Am
National Airlines, Inc.	National
<u>Governmental Agencies</u>	
Civil Aeronautics Board	CAB
National Mediation	





oversee representation matters by allowing it to direct an LPP arbitration in a representation matter?

#### PARTIES

The parties to the decision sought to be reviewed were the TWU and the CAB, and the Attorney General of the United States. Three parties intervened in this matter: Pan Am, IBT and IAM.

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Board  
Documents and Laws  
Labor Protective Pro-  
visions imposed by the  
CAB in the Pan Am  
-National merger  
Railway Labor Act,  
45 U.S.C. §151 ff

NMB

LPPs

RLA



## TABLE OF CONTENTS

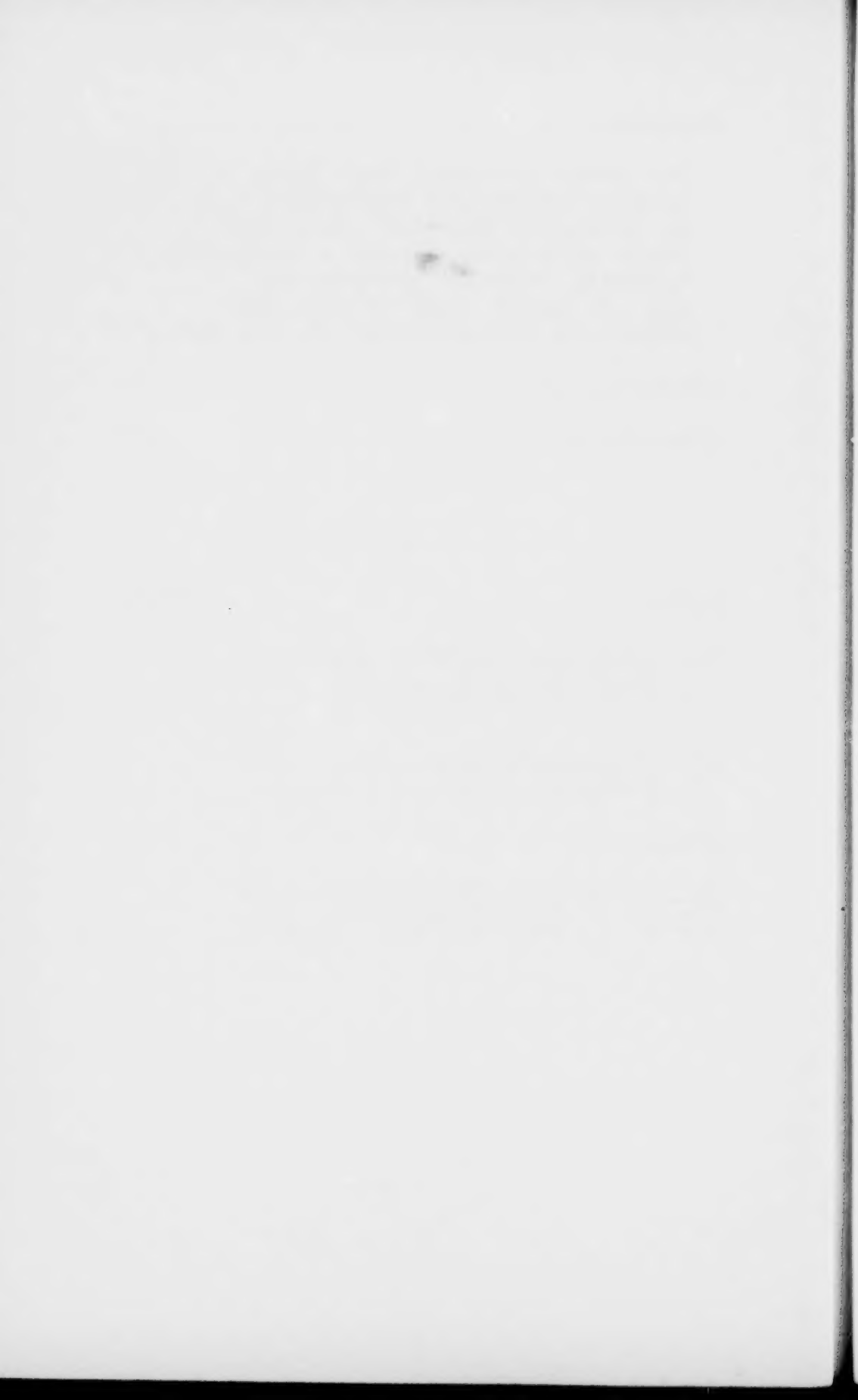
QUESTION PRESENTED.....	i
PARTIES.....	iii
OPINIONS BELOW.....	2
JURISDICTION.....	2
STATUTES AND REGULATIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	5
A. The Structures Of The Companies..	6
B. The Merger And The NMB's Rulings.....	7
C. The Seniority Integrations.....	10
1)a) TWU and Pan Am.....	11
b) The TWU Integration Challenge.....	12
2)a) IBT and Pan Am.....	14
b) The IBT Integration Challenge.....	14
D. The Genesis of the Present Action.....	15



ARGUMENT.....	17
THE COURT AFFIRMED THE CAB'S ABDICATION OF ITS RESPONSIBILITY TO DETERMINE WHETHER IAM'S AND IBT'S PETITIONS RAISED A REPRESENTATIONAL DISPUTE BETWEEN TWU AND IBT WHICH LIES WITHIN THE EXCLUSIVE JURISDICTION OF THE NMB..	17
SUMMARY.....	25
CONCLUSION.....	27

# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Air Line Pilots Ass'n, Int'l</u> <u>v. Texas Int'l Airlines,</u> 656 F.2d 16 (2d Cir. 1981) .....	18
<u>Brotherhood of Loc. Fire. &amp; Eng.</u> <u>v. Seaboard Coast Line R. Co.,</u> 413 F. 2d 19 (5th Cir.), <u>cert.</u> <u>den'd,</u> 396 U. S. 963 (1969).....	24
<u>Brotherhood of Railway and S.S.</u> <u>Clerks v. United Airlines, Inc.,</u> 325 F. 2d 576 (6th Cir. 1963)....	22, 24



<u>Delta Airlines v. CAB,</u> 574 F.2d 546 (D.C. Cir. 1978), cert. den'd, 439 U.S. 819 (1978)	21
<u>Division No. 14, Order of</u> <u>Railroad Telegraphers v.</u> <u>Leighty,</u> 298 F. 2d 17 (4th Cir. 1962).....	24
<u>Gangemi v. General Elec-</u> <u>tric Co.,</u> 532 F.2d 861 (2d Cir. 1976).....	22
<u>General Committee of Adjust-</u> <u>ment, B.L.E. v. Missouri-K-T</u> <u>R. Co.,</u> 320 U.S. 323 (1943).....	24
<u>John Wiley &amp; Sons, Inc. v.</u> <u>Livingston,</u> 376 U.S. 543 (1964)	22
<u>Leyva v. Certified Grocers</u> <u>of Calif.,</u> 593 F.2d 857 (9th Cir. 1979).....	22
<u>PAIN v. CAB, No. 82-1496 (D.C.</u> <u>Cir. 3/7/83) (per curiam order</u> <u>aff'ming CAB order 82-3-16).....</u>	15
<u>Pan American World Airways, Inc.</u> <u>v. CAB,</u> 683 F.2d 554 (1982).....	20
<u>Switchmen's Union of N. A. v. NMB,</u> 320 U.S. 297 (1943).....	17, 24





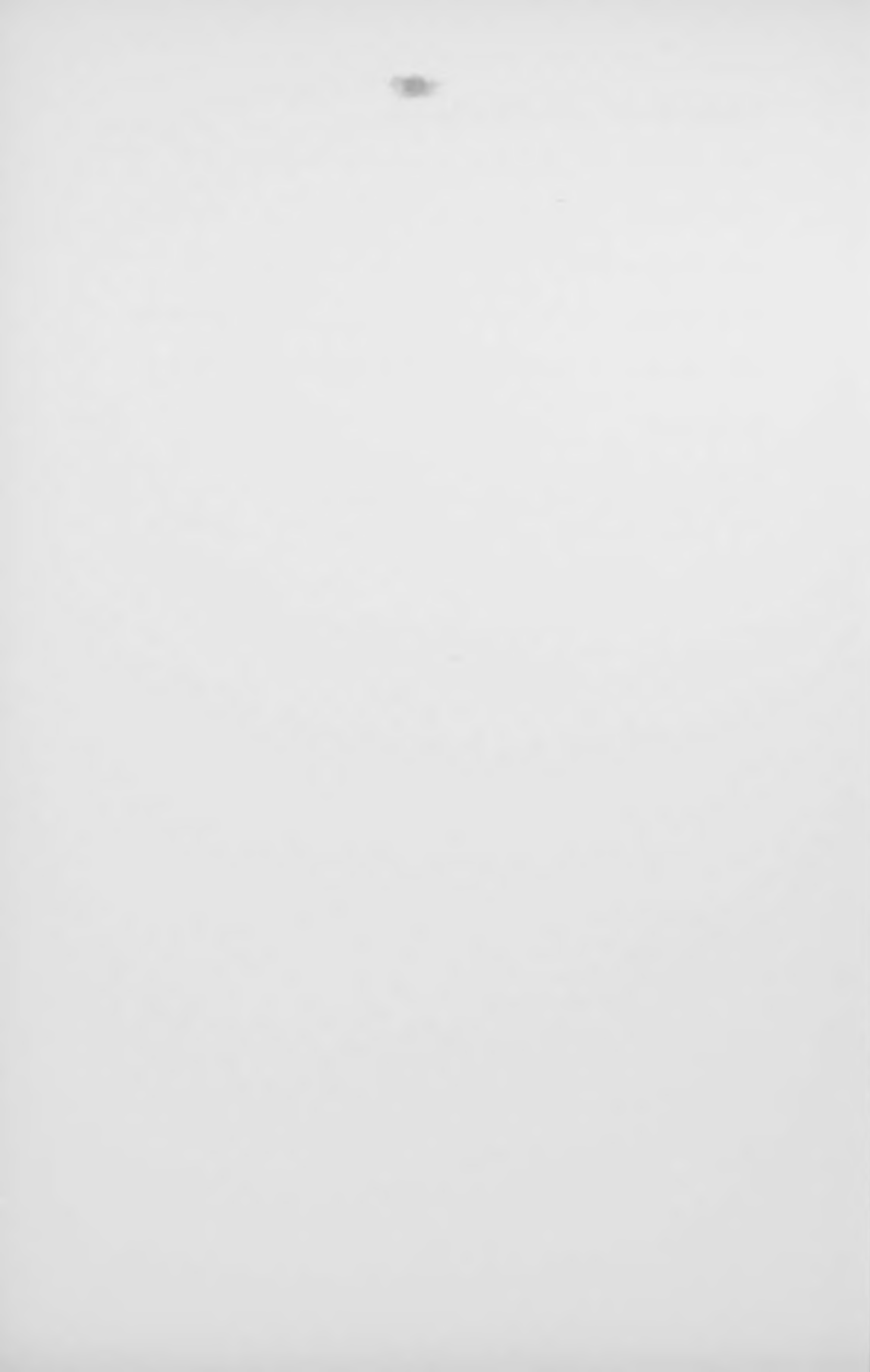
Administrative Decisions

CAB Order 82-3-16.....	15
CAB Order 82-8-63.....	passim
CAB Order 82-8-65.....	13
CAB Order 82-12-62.....	passim
NMB Order 7 NMB No. 114 (1980)	8-10

Statutes

RLA

Section 2, Ninth, 45 U.S.C.	
§ 152, Ninth .....	passim



IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1983  
No. \_\_\_\_\_

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TRANSPORT WORKERS UNION OF AMERICA  
AFL-CIO,  
Petitioner,

v.

CIVIL AERONAUTICS BOARD,  
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

Petitioner TWU respectfully prays that a writ of certiorari issue to review the judgment (with one judge concurring) of the United States Court of Appeals for the District of Columbia entered on January 20, 1984, upholding two orders of the CAB dated August 13, 1982 and December 16, 1982.



## OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 725 F.2d 775 and appears in the Appendix hereto at page A-1. The opinions of the CAB dated August 13, 1982 is officially reported at 97 CAB 565 and appears in the Appendix at page A-13. The opinion of the CAB dated December 16, 1982 is not officially reported, but appears in the Appendix at page A-33.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1984. This petition is filed within ninety (90) days of the date of this judgment. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).



## STATUTES AND REGULATIONS INVOLVED

Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, provides:

Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon





receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days de-



signate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

#### STATEMENT OF THE CASE

This case concerns CAB Orders which direct an arbitration among Pan Am, petitioner TWU, IBT and IAM ostensibly about the "seniority" of certain former National employees after the merger of National with Pan Am. The CAB's Orders were upheld by the Court below even though they constitute a usurpation of the NMB's authority over representation matters.



The decision of the Court below creates confusion as to the statutory authorities of the NMB and the CAB.

Petitioner TWU contends that there is nothing to arbitrate because the NMB determined at the time of the merger that the merger that Pan Am's existing class and craft lines would be kept intact, and the attempt to arbitrate in this case is nothing more than an attempt to circumvent the NMB's ruling. The CAB and the Court below both failed to see that by ruling for an arbitration, the CAB had overstepped and invaded the NMB's jurisdiction.

A. The Structures Of The Companies

Late in 1979, the CAB approved of a merger between National and Pan Am. The two companies had different employment structures which had to be rationalized. On pre-merger Pan Am, TWU represented

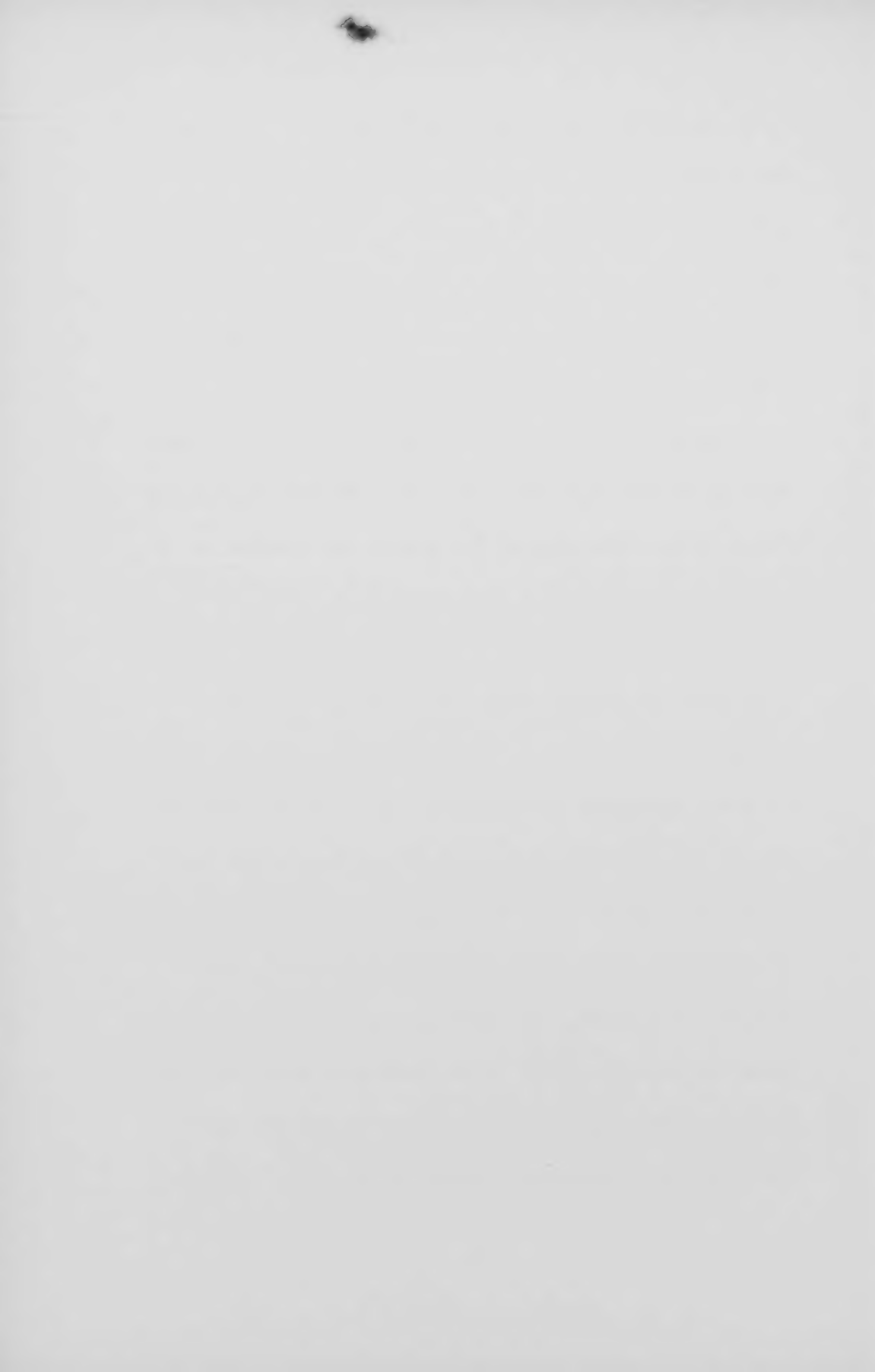


ramp agents, cleaners and mechanics, as well as other classes and crafts not involved in this dispute. IBT represented station agents and stock clerks, together with other classes and crafts not involved in this dispute.

On National, ALEA represented both ramp and station agents, while IAM represented cleaners, mechanics as well as stock clerks.

B. The Merger And The NMB's Rulings

Promptly after the CAB approved the merger, Pan Am put forward its solution to the problem presented by the differing employment structures. It announced to both Pan Am's and National's employees that when they became employees of the merged airline, it was going to treat them as members of the classes and crafts defined by its existing collective bargaining agreements, and, that its labor





organizations would continue to have the bargaining rights for these classes and crafts.<sup>2</sup>

ALEA immediately petitioned the NMB to block Pan Am from implementing its own class and craft structure on the merged airline, and for an order maintaining status quo pending a ruling by NMB as to what the class and craft structure should be on the merged airline and who should be the collective bargaining representatives on the merged airline. Docketing the case as R-5037, the NMB declined to grant ALEA relief.

ALEA made two other attempts to persuade the NMB to interfere with Pan Am's decision to use its own classes and

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<sup>2</sup> Subject to the rights under the RLA of the merged airline's employees to petition in the future to the NMB for it to hold a representation election.



crafts. Each time it was rebuffed. In its third ruling, the NMB stated, inter alia:

"The NMB's telegram of January 25, 1980, stated the Board's determination that '. . . the proper craft or class structure in R-5037 is that previously established on Pan American World Airlines, Inc. and Pan Am.'

Based upon all the facts and circumstances, the Board finds no basis to set aside or amend its previous determination of craft or class in this docket. The Clerical and Related employees of Pan American World Airways, Inc., including those appropriate classifications incorporated from National Airlines, Inc., constitute the proper craft or class in R-5037.

Further, the Board finds that the investigation in this docket has been conducted in such a manner as to afford all interested participants, including the ALEA, sufficient opportunity to express their views and to provide evidence regarding voter eligibility/showing of interest issues. The Board itself is satisfied with the thoroughness and quality of the show-



ing of interest investigation  
in R-5037. (7 NMB No. 114  
(1980)).

### C. The Seniority Integrations

With the NMB's approval, Pan Am merged the National employees in accordance with its own class and craft structure.

ALEA's station agents were assigned to IBT's bargaining unit. Its ramp agents went to TWU's unit. IAM's stock clerks went to IBT's bargaining unit, while cleaners and mechanics went to TWU's bargaining unit.

The method which Pan Am used to determine where particular employees of National belonged was that it assigned them to the Pan Am class or craft representing the position which they occupied on the date of the merger.

Although the NMB had determined the class and craft structure of the post-merger Pan Am, there remained the problem



of determining the relative seniority of the National and pre-merger Pan Am employees within Pan Am's class and craft structure. Since questions relating to seniority, as distinct from representation rights, are within the its jurisdiction, on this point the CAB gave guidance. Section 3 of the LPPs provides as follows:

Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

1)a) TWU and Pan Am

Between December, 1979 and April, 1980 TWU and Pan Am negotiated concerning the manner in which a "fair and equitable" seniority integration should be accom-





plished. They determined that integration required by Section 3 of the LPPs mandated that the seniority of all employees be treated in a uniform manner.

On April 18, 1980, on behalf of both the pre-merger Pan Am and the National employees it now represented on the merged airline, TWU entered into an agreement with Pan Am which set the seniority integration procedure.

b) The TWU Integration Challenge

Thereafter, a group of former National mechanics, calling themselves the Maintenance Legal Action Committee ("MLAC") objected to the Pan Am-TWU seniority integration agreement because it utilized a date-of-hire method of seniority integration instead of a ratio method.

TWU and Pan Am agreed to arbitrate this dispute pursuant to Sections 3 and 13 of the LPPs. The issue, which Pan Am, TWU



and MLAC agreed upon and submitted to the arbitrator, was whether "the integration of the seniority lists as agreed to by and between [Pan Am and TWU] on April 18, 1980 was accomplished in a fair and equitable manner."

All employees in the various crafts or classes of airline mechanics, cleaner and ground service employees received notice of the arbitration and were given the opportunity to participate in the arbitration. The Arbitrator was David Stowe, a former chairman of the NMB. After, several days of hearings which produced a transcript of 998 pages, Arbitrator Stowe issued a thirty-six page award ("Stowe Award"). Subsequently, individual former National mechanics challenged the propriety of the Stowe Award before the CAB. In Order 82-8-65, adopted August 16, 1982, the CAB dismissed their petition,



thus confirming the Stowe Award and the fairness and equitableness of TWU's integrated seniority list.

2)a) IBT and Pan Am

Pan Am and IBT also attempted to negotiate a seniority integration agreement with respect to the crafts or classes which IBT represents. Finally, after several months of negotiations, in August, 1980, the parties submitted the matter to William F. Usery, a former Secretary of Labor. Mr. Usery mediated between the parties, and they finally reached agreement on September 5, 1980. Mr. Usery then reviewed the final agreement and pronounced it fair and equitable within the guidelines of Section 3 of the LPPs.

b) The IBT Integration Challenge

Just as TWU's seniority integration agreement was challenged before the CAB,



so was the IBT's. A group calling itself Pan American International, Inc. ("PAIN") petitioned the CAB to have the IBT seniority integration set aside. In Order 82-3-16, adopted March 4, 1982, the CAB denied PAIN's challenge to the IBT seniority integration agreement. Upon PAIN's appeal, the Court of Appeals for the District of Columbia summarily affirmed the CAB's ruling. PAIN v. CAB, No. 82-1496 (D.C. Cir. 3/7/83) (per curiam order affirming CAB order 82-3-16).

#### D. The Genesis of the Present Action

While TWU and IBT were striving to have their respective seniority integration agreements upheld, IAM and IBT each filed a petition with the CAB improperly seeking LPP arbitrations against TWU.

IBT claimed that because TWU had not granted National station agents (formerly represented by ALEA and never in the TWU





unit) credit on the TWU post-merger seniority list for their National ramp agent seniority (which IBT had already given credit) that TWU's seniority integration was not "fair and equitable" within the meaning of Section 3 of the LPPs.

IAM claimed that because TWU had not granted National stock clerks (now represented by IBT and never in the TWU unit) credit on the TWU post-merger seniority list for their National mechanic or cleaner seniority (which IBT refused to recognize) that TWU's seniority integration was not "fair and equitable".

IAM's and IBT's petitions were consolidated by the CAB. In its Order 82-8-63, the CAB ordered an arbitration pursuant to Sections 3 and 13 of the LPPs, and in its Order 82-12-62, upon Pan Am's application for a rehearing, it reconfirmed its direction of arbitration. TWU ap-



pealed these CAB Orders to the United States Court of Appeals for the District of Columbia, and it is the ruling of the Court of Appeals affirming the CAB's Orders which TWU seeks in this petition to have reviewed.

#### ARGUMENT

THE COURT AFFIRMED THE CAB'S ABDICATION OF ITS RESPONSIBILITY TO DETERMINE WHETHER IAM'S AND IBT'S PETITIONS RAISED A REPRESENTATIONAL DISPUTE BETWEEN TWU AND IBT WHICH LIES WITHIN THE EXCLUSIVE JURISDICTION OF THE NMB

Exclusive jurisdiction over representation matters arising under the RLA rests with the NMB. RLA, Section 2 Ninth, 45 U.S.C. §152 Ninth; Switchmen's Union of N. A. v. NMB, 320 U.S. 297 (1943). Even if a dispute could be classified as both a seniority dispute and a representational dispute, exclusive jurisdiction lies with the NMB as the expert agency with respect to airline labor relations invol-



ving parties governed by the RLA. Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, 656 F.2d 16, 23 (2d Cir. 1981).

In Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, supra, the Court found that the facts presented neither a pure representation dispute nor a pure claim of interference with contract which might have been separately actionable in court under other provisions of the RLA. Nevertheless, it ruled that because of the court's traditional limited role in the enforcement of the RLA and the exclusive jurisdiction of the NMB to decide representation disputes, that it must defer to the NMB once a representational dispute, even in non-traditional form, is disclosed.

Given the precedent of deferring to the NMB where there is even a hint of a representation dispute, it was prejudicial



error for the CAB not to determine whether the petitions of the IBT and IAM presented a representation dispute beyond the scope of its jurisdiction.

The CAB abdicated its responsibility by referring the jurisdictional question to an LPP arbitrator. It conceded that while it might well be "violat[ing] the NMB's order [determining the craft or class structure on the post-merger Pan Am]," it "preferred" to have the issue resolved by an "experienced" labor arbitrator. (Order 82-8-63, Appendix pp. A-26 and A-27; Order 82-12-62, Appendix p. A-40)

In affirming the CAB's decisions, the Court below merely concluded pro forma that the CAB's ruling were not "arbitrary and capricious" within the meaning of Section 10(e) of the Administrative Procedure Act (Appendix p. 8). It all but ignored the critical point that the CAB



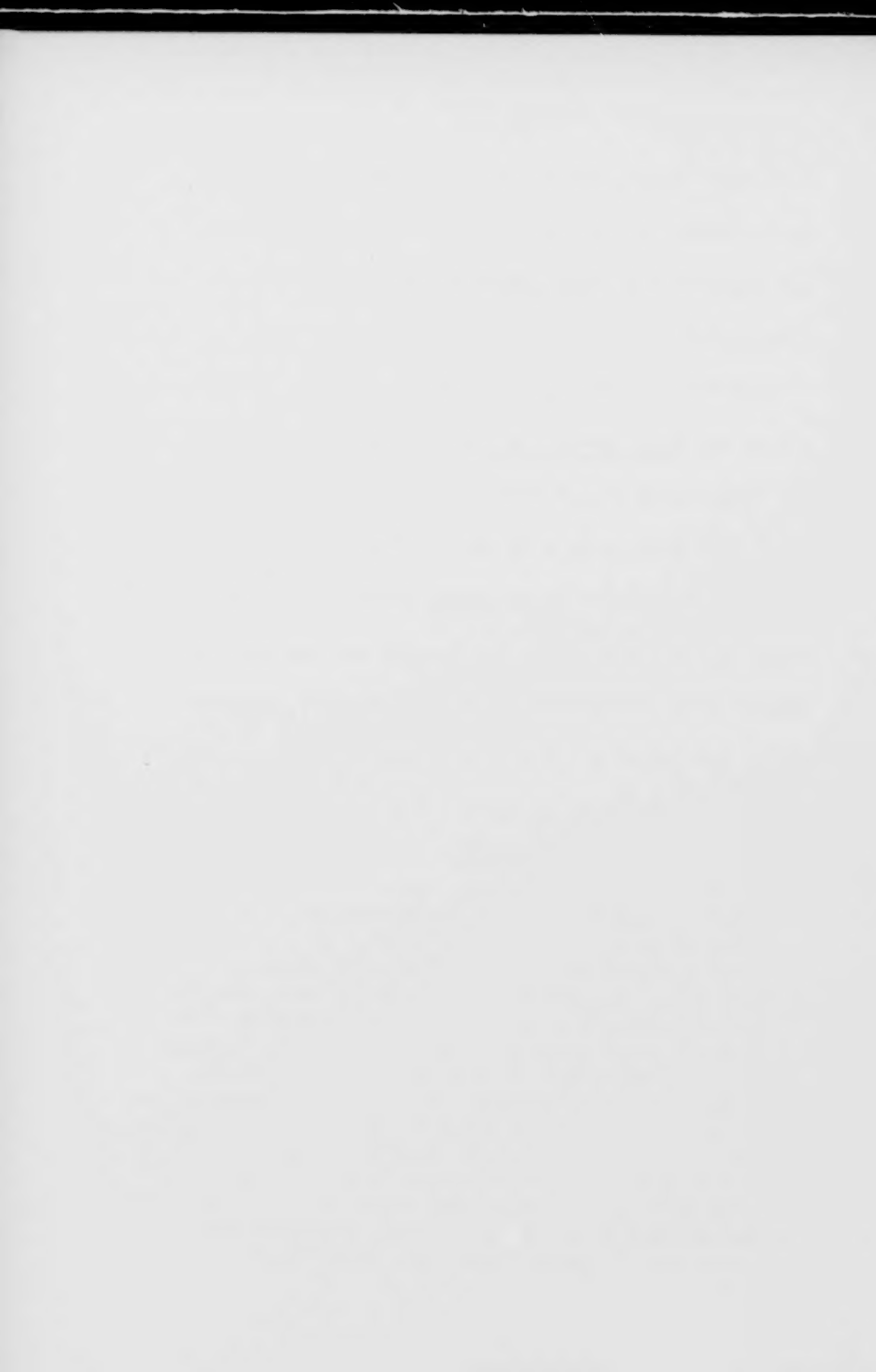


had not evaluated its jurisdiction, and had ceded to an arbitrator the question of whether a representation dispute is involved.<sup>3</sup>

The Court below relied upon its decision in Pan American World Airways, Inc. v. CAB, 683 F.2d 554 (1982) to hold that the CAB was correct to order arbitration because doubts regarding arbitrability should be resolved in favor of coverage where the controverted claim can reasonably be said to fall within the scope of the arbitration clause (Appendix p. A-6).

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<sup>3</sup> The failure of the Court below to see the magnitude of the CAB's error is particularly vexing in this case because at oral argument in the Court below, when questioned concerning the CAB's handling of TWU's jurisdictional claim, counsel for the CAB admitted that the claim was novel. He stated that this matter was "the only case of which I am aware of where there has been a dispute between unions, where one party has claimed that there was National Mediation Board jurisdiction involved" (Appendix pp. A-55 and A-56).



However, this ruling is in sharp conflict with its own earlier ruling concerning the interplay of jurisdictional questions with questions of arbitrability. In Delta Airlines v. CAB, 574 F.2d 546 (D.C. Cir. 1978), cert. den'd, 439 U.S. 819 (1978), the Court said:

Once it is determined, therefore, that the subject matter of a controversy is subject to arbitration under the LPP's, we believe that the Board has the discretion to refer to the arbitrator questions concerning the procedural propriety of the claims for arbitration of that controversy. Delta Airlines v. CAB, supra, at p. 550 [Emphasis supplied].

In this case, by contrast, the CAB never resolved the threshold question of the its own jurisdiction before deferring the matter to an arbitrator. Indeed, it improperly left the arbitrator to determine whether the dispute of the IBT and IAM involves a representation question.



Moreover, under the teachings of this Court, the jurisdictional question of whether a dispute is arbitrable always remains with the Court, and cannot be delegated to an arbitrator. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-7 (1964). See also Leyva v. Certified Grocers of Calif., 593 F.2d 857, 861 (9th Cir. 1979); Gangemi v. General Electric Co., 532 F.2d 861, 865 (2d Cir. 1976).

While it is true that the IBT and the IAM couched the dispute as one involving "seniority", the CAB is obliged to pierce the pleadings in order to discern the true nature of the controversy. Brotherhood of Railway and S.S. Clerks v. United Airlines, Inc., 325 F. 2d 576, 579 (6th Cir. 1963).



Had the the Court below or the CAB performed such an analysis in this matter, it would have discerned that the critical issues are: a) whether former National stock clerks and station agents will be permitted to travel across Pan-Am's class or craft lines, and b) which union has authority to deal with Pan Am concerning seniority in those classes or crafts which TWU represents.

The Court below believed that because "some individual employees ...[might] be allowed a one-time opportunity to change from one class and craft to another" (Appendix p. A-8), that the dispute did not rise to the level of a representational dispute. The limitations to a one-time movement may lessen the long-range impact of the encroachment on the NMB's jurisdiction and TWU's bargaining





rights, but it does not change the impropriety of permitting any such encroachment.

Time and again, courts have held that when a matter involves the movement of employees back and forth across different class and craft lines, it is a representational dispute, and that Congress has vested exclusive jurisdiction to resolve such disputes in the NMB. See Switchmen's Union of N. A. v. NMB, supra, at p. 300-1; General Committee, B. L. E. v. Missouri-K-T R. Co., 320 U.S. 323, 336 (1943); Brotherhood of Railway and S.S. Clerks v. United Airlines, supra; Brotherhood of Loc. Fire. & Eng. v. Seaboard Coast Line R. Co., 413 F. 2d 19, 24-5 (5th Cir.), cert. den'd, 396 U. S. 963 (1969); Division No. 14, Order of Railroad Tel. v. Leighty, 298 F. 2d 17, 19-20 (4th Cir. 1962).



Since the dispute is one which involves a representation question over which the CAB has no jurisdiction, it cannot obfuscate its lack of jurisdiction simply by referring the matter to an arbitrator.

#### SUMMARY

When the Pan Am-National merger was first announced, Pan Am stated that it was going to apply its class or craft structure on the merged airline and was going to recognize its duly certified collective bargaining representatives as the representatives for all employees on the merged airline. ALEA, one of the unions which stood to lose both membership and representation status if Pan Am effectuated its plan, sought before the NMB to block the plan. The NMB ruled that Pan Am could apply its class or craft structure on the merged airline.



IAM and IBT seek to circumvent this ruling, and the NMB's exclusive jurisdiction, by raising claims predicated on seniority rights accrued under National's class or craft structure, even though the NMB has ruled that National's class or craft structure did not govern on Pan Am. The CAB cannot avoid the impact of the NMB's ruling simply by delegating the matter to an arbitrator. The jurisdictional defect renders the CAB powerless to make such a delegation.



## CONCLUSION

For all the reasons set forth in this brief, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,  
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Of Counsel:

O'Donnell & Schwartz

April 16, 1984

## APPENDIX



**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-2080

TRANSPORT WORKERS UNION OF AMERICA,  
AFL-CIO, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

PAN AMERICAN WORLD AIRWAYS, INC.,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,  
INTERNATIONAL ASSOCIATION OF MACHINISTS &  
AEROSPACE WORKERS, INTERVENORS

---

Petition for Review of an Order of the  
Civil Aeronautics Board

---

Argued 27 September 1983

Decided 20 January 1984

*Malcolm A. Goldstein*, for petitioner.

*Joseph L. Manson, III*, with whom *Ronald B. Natalie*  
and *Thomas E. Acey, Jr.* were on the brief, for inter-  
venor, Pan American World Airways, Inc.

*Thomas L. Ray*, Assistant General Counsel, Civil Aeronautics Board with whom *Ivars V. Mellups*, Acting General Counsel and *Barbara Thorson*, Attorney, Civil Aeronautics Board, *Robert B. Nicholson* and *William J. Roberts*, Attorney, Department of Justice were on the brief, for respondent.

*James A. McCall* with whom *Robert M. Baptiste* and *Roland P. Wilder, Jr.* were on the brief, for intervenor, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

*John O'B. Clarke, Jr.* was on the brief, for intervenor, International Association of Machinists & Aerospace Workers.

Before: TAMM and WILKEY, *Circuit Judges*, and  
MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge WILKEY*.

Concurring Opinion filed by *Senior Circuit Judge MACKINNON*.

*WILKEY, Circuit Judge*: In this case petitioners appeal from two orders of the Civil Aeronautics Board (CAB) requiring arbitration proceedings.<sup>1</sup> We find that the CAB properly issued the orders, and accordingly affirm.

## I. FACTS

On 24 October 1979, the Civil Aeronautics Board approved a merger between Pan American World Airways, Inc. (Pan Am) and National Airlines (National).<sup>2</sup> The CAB conditioned its approval of the merger on the parties' acceptance of labor protective provisions (LPPs). Following the approval of the President, the merger became effective on 19 January 1980.

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<sup>1</sup> CAB Order 82-8-63 (13 August 1982) [hereinafter, Order], Joint Appendix [JA] at 1; CAB Order 82-12-62 (16 December 1982) [hereinafter, Order on Rehearing], JA at 6.

<sup>2</sup> CAB Order 79-12-163/164/165 (24 October 1979).

The labor protective provisions imposed by the CAB were the standard provisions used by the agency since 1972. Section 3 required the merging airlines to provide for the integration of seniority lists "in a fair and equitable manner."<sup>3</sup> Section 13 obligated the parties to resolve disputes involving seniority rights either through negotiations or arbitration.<sup>4</sup> By virtue of these provisions the CAB retained power to direct arbitration of merger-related seniority disputes.

From the outset the merger posed labor difficulties, since the employees of the two merging airlines were represented by different labor unions using different craft and class systems. National's mechanics, cleaners and stock clerks had been in one bargaining unit, represented by the International Association of Machinists and Aerospace Workers (IAM). National's station agents and ramp agents formed another bargaining unit, represented by the Air Line Employees Association (ALEA). At Pan Am, however, the mechanics and cleaners were grouped with the ramp agents in a classification represented by the Transport Workers Union of America, AFL-CIO (TWU). The Pan Am stock clerks and station agents

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<sup>3</sup> Section 3 of the Labor Protective Provisions reads:

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

<sup>4</sup> Section 13(a) of the Labor Protective Provisions reads in relevant part:

Section 13(a). In the event that any dispute or controversy . . . arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator . . . . The decision of the arbitrator shall be final and binding on the parties.

formed another bargaining unit, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT).<sup>5</sup>

After the CAB's approval of the merger, the National Mediation Board (NMB) ruled that Pan Am's premerger bargaining structure should prevail at the new merged airline. The National employees were folded into the Pan Am system according to their predominant duties at National. Because the two airlines had different craft and classification systems, employees who had belonged to the same bargaining unit at National were split into two different bargaining units at Pan Am. National cleaners thus joined a bargaining unit represented by the TWU, while their former co-unionist stock clerks joined a different bargaining unit represented by the IBT. Similarly, the National ramp agents were assigned to the TWU, while their former co-unionist station agents joined the IBT.

The integration plan approved by the NMB inevitably created disputes which had to be resolved through arbitration. A group of former National mechanics, calling themselves the "Maintenance Legal Aid Committee" (MLAC), opposed the TWU seniority list because it used a date-of-hire method instead of a rank-ratio method. Pan American and TWU voluntarily consented to arbitrate the issue with MLAC under the LPPs. On 17 December 1981 Arbitrator David H. Stowe issued an order upholding date-of-hire integration as appropriate under the LPPs.<sup>6</sup>

The IBT seniority integration agreement was also challenged by former National employees. The IBT seniority

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<sup>5</sup> The collective bargaining structures of both airlines before the merger and of Pan American after the merger are set forth in some detail in the CAB orders under review.

<sup>6</sup> Arbitration Pursuant to CAB Order 79-12-164 in Docket 33282 (17 December 1981) [hereinafter, Stowe Award]; JA at 23, 58.

list had been set after former Secretary of Labor William J. Usery was retained to mediate in negotiations between IBT and Pan Am. With Usery's assistance, the airline and the union agreed on a seniority system of list integration based on an employee's last date of hire, and on a point seniority district basis, with a concurrent right allowing employees whose jobs are abolished to bump junior employees. The CAB approved this plan,<sup>7</sup> and a panel of this court subsequently affirmed the CAB's decision with a *per curiam* order.<sup>8</sup>

The negotiations between Pan Am and the unions apparently did not specifically resolve whether the former National stock clerks and station agents—now represented by the IBT—could cross the Pan Am class and craft lines, and use their seniority to bump their former co-unionists from their jobs. The IBT and IAM argued that a fair integration would allow the former National employees a one-time chance to cross the Pan Am class and craft lines, while TWU—which apparently had not sought to secure such a right for its members—opposed the IBT's and IAM's claim. Claiming that the issue properly arose under the LPPs, the IBT and the IAM sought a CAB order compelling arbitration of the issue.

The CAB found that the issue raised does “involve a seniority dispute which was the direct result of the Pan American-National merger and therefore falls within the scope of the LPPs.”<sup>9</sup> Consistent with this finding, the CAB ordered the parties to arbitrate the dispute,<sup>10</sup> and on rehearing again denied the requests of the TWU and Pan Am.<sup>11</sup>

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<sup>7</sup> CAB Order 82-3-16 (4 March 1982).

<sup>8</sup> P.A.I.N. v. CAB, No. 82-1496 (D.C. Cir. 7 March 1983) (*per curiam* order affirming CAB order 82-3-16).

<sup>9</sup> Order at 4; JA at 4.

<sup>10</sup> Order at 5; JA at 5.

<sup>11</sup> Order on Rehearing; JA at 6.

Pan Am and the TWU seek review of the CAB orders requiring arbitration. They advance two principal arguments: first, that the issue sent to arbitration does not involve a bona fide seniority dispute under the LPPs, and so is outside the jurisdiction of the CAB,<sup>12</sup> and secondly, that any issue as to the validity of the seniority lists has been resolved in the prior arbitration.<sup>13</sup>

## II. ANALYSIS

We note at the outset that the scope of review of the Board order at issue here is very narrow. Under Section 10(e) of the Administrative Procedure Act, we may set aside the Board's action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or . . . unsupported by substantial evidence . . . ." <sup>14</sup>

As this court has previously held, the standards governing arbitration of disputed claims under collective bargaining agreements are equally applicable to disputes arising under the LPPs.<sup>15</sup> In the collective bargaining context, arbitration is required of any controverted claim that can reasonably be said to fall within the scope of the arbitration clause, with all doubts being resolved in favor of arbitration. In determining whether an LPP claim is arbitrable, the CAB "plays the role of a court in a traditional labor dispute and is justified in referring to arbitration any dispute it determines to be at least argu-

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<sup>12</sup> Brief of Petitioner Transport Workers Union of America, AFL-CIO [hereinafter, TWU Brief] at 9-23; Brief of Intervenor Pan American World Airways, Inc. [hereinafter, Pan Am Brief] at 22-39.

<sup>13</sup> TWU Brief at 24-25; Pan Am Brief at 19-22.

<sup>14</sup> 5 U.S.C. 706(2) (1982).

<sup>15</sup> Pan American World Airways, Inc. v. CAB, 683 F.2d 554, 559 (D.C. Cir. 1982); Delta Air Lines, Inc. v. CAB, 574 F.2d 546, 550 (D.C. Cir.), *cert. denied*, 439 U.S. 819 (1978).



ably covered by the LPPs.”<sup>16</sup> Thus, if the CAB was correct in concluding that this case was arguably covered by the LPPs, and if the issue had not already been resolved under the LPPs, the CAB’s order must be upheld.

#### A. *Presence of Seniority Dispute*

The predominant issue in this case involves the proper characterization of the complaint. If the dispute involves seniority rights, then it arises under the labor protection provision which requires “fair and equitable” integration of the seniority lists,<sup>17</sup> and so clearly comes under the sway of the CAB. If, on the other hand, the issue really involves representational rights—as the TWU and Pan Am claim it does<sup>18</sup>—then it raises issues reserved to the

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<sup>16</sup> *Pan American World Airways, Inc. v. CAB*, 683 F.2d 554, 559 (D.C. Cir. 1982). Petitioners argue that the *Pan American* case is distinguishable because it did not involve a jurisdictional question. They argue that the CAB could not delegate to an arbitrator the jurisdictional issue.

In analyzing this claim, it is important first to note that the request for arbitration on its face clearly involves a seniority dispute squarely within the jurisdiction of the CAB under the LPPs. This is thus not a case where the CAB never had jurisdiction; at most, it would be a case where the agency was stripped of jurisdiction because of a competing grant of exclusive jurisdiction to the NMB.

The petitioners’ argument would thus be more compelling if a showing had been made that the arbitration would encroach on the NMB’s jurisdiction. See *Air Line Pilots Ass’n, Int’l v. Texas Int’l Airlines*, 656 F.2d 16, 23 (2d Cir. 1981). However, the current record fails to show that the arbitration will cause a conflict with the NMB.

This case thus fits squarely under *Pan American*. It is simply a case where the Board “is justified in referring to arbitration any dispute it determines to be at least arguably covered by the LPPs.” 683 F.2d at 559. The arbitrator remains free to conclude, of course, that the dispute is ultimately not within the LPPs.

<sup>17</sup> Labor Protective Provision 3.

<sup>18</sup> TWU Brief at 9-23; Pan Am Brief at 22-39.

NMB, and the CAB has at least arguably overstepped its bounds.<sup>19</sup>

The CAB determined that the dispute did involve seniority rights.<sup>20</sup> The record shows that this conclusion was not arbitrary and capricious. The kernel of the dispute raised by the IBT is seniority rights. Any relief granted by the arbitrator or the CAB must be couched in terms of seniority rights. The dispute is thus at least facially a seniority dispute.

The TWU and Pan Am argue nonetheless that the case really involves representational rights. They assert that the IBT, through the guise of protecting its members' seniority rights under the LPPs, really seeks to force Pan Am to treat it as the bargaining representative of a class far larger than that allotted to it by the NMB.

This argument fails to persuade. The IBT does not seek to acquire an expanded representational status, nor does it strive to seek future recognition as the bargaining representative for those crafts and classes now represented by TWU. Nor does the IAM seek to perpetuate its representative status in the new, merged airline. Nothing the unions seek would alter the class and craft system approved by the NMB. At most, if the IBT and IAM should win before the arbitrator, some individual employees would be allowed a one-time opportunity to change from one class and craft to another. While some individual employees would be represented by a different union if the arbitrator accepted the two unions' arguments, that alone does not render this a representational dispute. What matters is that although individual employees might for

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<sup>19</sup> *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962).

<sup>20</sup> Order at 4, JA at 4.



whatever reasons change jobs, the boundaries of the bargaining units would remain unchanged.<sup>21</sup>

#### B. *Prior Arbitration*

The TWU and intervenor Pan Am also argue that any issues as to the fairness of the seniority integration under the LPPs was resolved by the prior proceeding before arbitrator Stowe.<sup>22</sup> They decry the reopening of an already resolved dispute.

The prior arbitration did consider the fairness of the seniority lists which were devised following the merger. That arbitration, however, faced different facets of the overall fairness issue, and differed in at least two critical respects.

First, the Stowe award faced an issue not raised here—whether the date-of-hire method was a fair method of integrating the seniority lists.<sup>23</sup> The critical issue pre-

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<sup>21</sup> Pan Am and TWU cite a number of cases which they claim establish that this case should be treated as a representational dispute. In this case, however, the IBT is not trying to represent anyone outside its established bargaining unit, and the IAM does not seek to perpetuate its prior representation. It is thus distinguishable from the cases cited by the petitioners, which largely involve disputes over whether a union could represent a specific group of employees, or whether a certified bargaining unit of one group was entitled to represent a larger group of otherwise unorganized employees. See, e.g., *Switchmen's Union v. NMB*, 320 U.S. 297 (1943); *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines*, 656 F.2d 16 (2d Cir. 1981); *Adams v. Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), cert. denied, 431 U.S. 915 (1977); *Brotherhood of Railway & Steamship Clerks v. United Air Lines*, 325 F.2d 576 (6th Cir. 1963), cert. dismissed, 379 U.S. 26 (1964); *Ruby v. American Airlines*, 323 F.2d 248 (2d Cir. 1963).

<sup>22</sup> TWU Brief at 24-25; Pan Am Brief at 19-22.

<sup>23</sup> The award issued by arbitrator Stowe read:

The merger of the seniority lists of former National employees and of former Pan Am employees in the Mechanic

sented here, whether the former National employees could use their seniority to bid for jobs under TWU's representation, was not treated. The claim presented here is thus a fresh one, not resolved by the prior proceeding.

Secondly, the parties ultimately seeking relief here—the former National stock clerks and station agents—were not represented before arbitrator Stowe. Even the TWU and Pan Am concede that those employees were not involved in that proceeding.<sup>24</sup> The Board order requiring arbitration here thus conforms fully with the Board's duty to see that all employee groups have a fair opportunity to participate in the integration process.

### III. CONCLUSION

We reach no conclusions as to what result the arbitrator should reach. We find only that the CAB acted within its authority in sending this case to arbitration. For the foregoing reasons, the orders of the CAB are

*Affirmed.*

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and Ground Service craft, or class, shall be on the date of hire basis as set forth in the Agreement dated April 18, 1980 between Pan Am and TWU.

JA at 58. The award, which is the only element of the arbitration open to judicial review, is by its terms limited to the "date-of-hire" issue. It says nothing about the dispute raised in this case.

<sup>24</sup> TWU Brief at 10; Pan Am Brief at 37.

MACKINNON, *Senior Circuit Judge* (concurring). In this case it should be pointed out that the CAB doubted that the prior approval of the seniority lists by the arbitrator and the CAB precluded the present claims of IBT and IAM, but the CAB made it clear that Pan Am and TWU would be "free to argue" before the arbitrator that reconsideration of the seniority lists would be unfair to them. Order 82-8-63 at 5 (JA 5). Subject to calling attention to this comment, I concur in the foregoing opinion.



UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board  
at its office in Washington, D.C.,  
on the 13th day of August, 1982

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In the matter of :  
 :  
PAN AMERICAN-ACQUISITION OF :  
AND MERGER WITH NATIONAL :  
(Docket 33283) :  
 :  
Petition of International : Docket  
Association of Machinists : 39974  
and Aerospace Workers to :  
compel arbitration. :  
 :  
Petition of International : Docket  
Brotherhood of Teamsters, : 40033  
Airline Division to compel :  
arbitration. :  
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ORDER

This proceeding arises out of the Pan  
American-National merger approved by the  
Board and consummated on January 19,  
1980, subject to implementation of labor  
protective provisions (LPP's) (Orders  
79-12-163/164/165). Before the Board are

## A 14

two requests for arbitration of seniority disputes which invoke our retained jurisdiction over sections 3 and 13(a) of the LPP's.<sup>1</sup>/ The petitions were filed by two unions on behalf of two groups of former National employees now employed by Pan American, the station agents and the stock clerks. The petitions' purpose is to reestablish the seniority rights these workers had at National in the cleaner

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1\_/ "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

"Section 13(a). In the event that any dispute or controversy \*\*\* arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator \*\*\*. The decision of the arbitrator shall be final and binding on the parties."

## A 15

and ramp agent job classifications.

Since the petitions have shown that there is a dispute over seniority rights which resulted from the Pan American-National merger, the dispute appears to be covered by the LPP's. We will therefore grant the requests for arbitration of the dispute. In doing so, of course, we have determined only that the petitioners are entitled to arbitration not that they should be awarded any of the relief they seek.<sup>2</sup>/

Under the Railway Labor Act, the National Mediation Board (NMB) has exclusive jurisdiction to determine class or craft composition for airline employee bargaining units and representational rights. At National, the NMB had sanctioned a

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<sup>2</sup>/ Each of the parties filed one or more replies not authorized by the Board's rules and motions for leave to file unauthorized documents. We will grant the motions.

## A 16

class or craft unit composed of, among other things, the job classifications of cleaner and stock clerk, which was represented by International Association of Machinists and Aerospace Workers (IAM). A second class or craft unit at National consisted of the classifications of station agent and ramp agent and was represented by Air Line Employees Association (ALEA). Pursuant to collective-bargaining agreements between National and the unions, IAM cleaners and stock clerks could work in either position and accrue separate seniority for each. The same was true for ALEA station and ramp agents. Consequently, for example, National stock clerks with cleaner seniority or station agents with ramp agent seniority could bid for the latter positions on the basis of this separately maintained seniority if laid off as stock clerks



## A 17

or station agents. In doing so, they would not cross National's established unit class or craft lines, or come under the aegis of another union representative.

This situation changed after National's merger with Pan Am, for at Pan Am the Transport Workers Union of America, AFL-CIO (TWU) represented a unit containing cleaners and ramp agents, and the International Brotherhood of Teamsters, Airline Division (IBT) represented a unit of stock clerks and station agents. Their contracts with Pan American would not permit TWU cleaners and IBT stock clerks, or TWU ramp agents and IBT station agents, respectively to exchange jobs and hold dual seniority as the employees' counterparts had done at National.

## A 18

After the merger, the NMB ruled that Pan American's premerger bargaining structure, as opposed to National's should prevail at the combined carrier. In order to conform to Pan American's job classifications for bargaining units, former National cleaners/stock clerks and ramp/station agents were assigned to one of their two job classifications according to their predominant duties at National. They were placed in one of Pan American's class and craft bargaining units which did not include their other National job classification. The stock clerks, for example, no longer shared a bargaining unit with the cleaners and instead were combined with the station agents. The National employees also became represented by a new collective-bargaining agent, either TWU or IBT. These unions then bargained with Pan American,

## A 19

as required by section 3 of the LPP's, about integrated seniority for each of the combined National and Pan American classes and crafts.<sup>3</sup>/

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3\_/ Both TWU's and IBT's seniority agreements with Pan American were not resolved without difficulty. A group of former National mechanics, calling themselves "Maintenance Legal Aid Committee" (MLAC), disputed the TWU agreement on the ground that it constructed an integrated list by date-of-hire instead of by a rank-ratio method. (Mechanics are a job classification also included in the TWU Pan American unit with cleaners and ramp agents.) Pan American and TWU voluntarily consented to arbitrate the issue with MLAC under section 13(a) of the LPP's. On December 17, 1981, Arbitrator David H. Stowe issued an award upholding the date-of-hire integration as appropriate under section 3. (A petition to vacate the award, filed by employees Billy J. Williams, Pedro L. Contreras, Harrell D. Scott, and Kenneth F. King, is pending at the Board in Docket 40407.)

The IBT seniority integration agreement with Pan American resulted from mediation conducted by Former Secretary of Labor William J. Usery, Jr. This agreement was challenged before the Board by some 150 former National employees calling themselves "Pan American In National" (P.A.I.N.). By Order 82-3-16, served March 8, 1982, we held, among other things, that P.A.I.N. failed to

## A 20

The petitions filed by IAM and IBT seek to reestablish for a period of time the seniority rights that National's stock clerks and station agents had, respectively, in the cleaner and ramp agent job classifications. The IAM petition is filed on behalf of the stock clerks, employees who had been represented by IAM at National, and the IBT petition is filed on behalf of the station agents, who are now represented by IBT.

IAM claims arbitration is required because there has been no "fair and equitable" integration of the stock clerks' seniority, since many of the National stock clerks held seniority rights in other job classifications which were not

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show that the interests of its members had not been fairly represented by IBT in agreeing to a date-of-hire seniority list for the unit. We accordingly dismissed their petitions, a decision for which they are seeking judicial review, P.A.I.N. v. CAB, D.C. Cir. No. 82-1496 (filed May 3, 1982).

## A 21

preserved by the integrated seniority list agreed to by Pan Am and TWU. IAM argues, moreover, that some of the stock clerks have been injured as a result, for they were laid off from their stock clerk jobs without being able to use the seniority rights they had accrued as cleaners at National. IAM concludes that the stock clerks' claim comes within the scope of the LPP's and must therefore be arbitrated. IBT similarly argues that the Board must order an arbitration of the seniority dispute involving the station agents now represented by IBT and the ramp agents now represented by TWU.<sup>4</sup>/ Both IAM and IBT state that Pan

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<sup>4</sup>/ IBT has not objected to IAM's continuing representation of former National stock clerks in this regard and has stated its agreement to a consolidated arbitral proceeding, with Pan American and TWU, of the station-ramp agent and stock clerk disputes. We note that no union has raised the dual seniority matter on behalf of former National cleaners at Pan American who are

## A 22

American and TWU at one time were willing to arbitrate these claims with IBT and IAM, but not under the LPP's. IBT and IAM, therefore, have petitioned for orders directing arbitration under the LPP's.

Pan American and TWU oppose LPP arbitration. They point out that IBT and IAM do not allege that the integrated list for the TWU cleaner-ramp agent unit (or the IBT stock clerk-station agent unit) in itself violates the LPP's. Instead, Pan American and TWU contend that by these claims IBT and IAM are attempting to circumvent the NMB's exclusive author-

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now in TWU's unit. While these employees have been credited, at Pan American, for their accrued National stock clerk seniority as part of their total unit seniority, there is no express contention to us that they should be entitled to exercise their National stock clerk seniority in IBT's Pan American stock clerk unit. Presumably, however, if stock clerks could bid into the cleaner unit, the same should be true for cleaners in the stock clerk unit.

ity to specify class or craft bargaining units and representational rights at merged Pan American. They contend that allowing former National stock clerks and station agents, now in IBT's Pan American unit, to claim residual cleaner and ramp agent seniority in TWU's unit -- the relief sought here by petitioners -- means that these employees would cross class or craft lines contrary to the NMB's express ruling maintaining Pan American's pre-merger collective-bargaining structure. Thus Pan American and TWU essentially argue that the Board has no authority under the LPP's to authorize employee movement back and forth between classes or crafts which are represented by different labor organizations. Pan Am and TWU filed further pleadings contending that the seniority integration of the employees involved had already been resolved through

## A 24

arbitration proceedings. They cited Order 82-3-16 (March 4, 1982), dismissing a challenge to the integrated seniority list negotiated by Pan Am and IBT, and the arbitration of the seniority dispute among the employees represented by TWU. IAM and IBT filed replies contending that they had no intention of challenging the NMB's decision and that the other arbitration and negotiation proceedings cited by Pan American and TWU did not foreclose the arbitration of the seniority rights claimed by the stock clerks and station agents.

In considering petitions for arbitration filed under section 3 of the LPP's, we do not attempt to decide the merits of the claim. Section 3 states that an arbitration should be held if there is a dispute among the carrier and the labor representatives over the fairness of the



seniority integration of the merged carrier's employees. Under this standard we have concluded that the petitions for arbitration of IAM and IBT should be granted. Their claims do involve a seniority dispute which was the direct result of the Pan American-National merger and therefore falls within the scope of the LPP's. TWU and IBT assert that seniority for some of the employees who held two classifications at National (the station agents, ramp agents, and stock clerks) has yet to be credited to them as integrated Pan American seniority. In their view, accordingly, the existing seniority integration agreements between Pan American, TWU and IBT have not completely resolved the seniority issues in a "fair and equitable" manner.

## A 26

Pan American and TWU argue that the relief sought by IAM and IBT would constitute an attack on Pan American's craft and representational bargaining structure approved by the NMB. Clearly, the solution to the dispute favored by petitioners, namely, allowing station agents, ramp agents, and stock clerks to temporarily exercise their residual National seniority for their second former job classification at Pan American, might mean that these employees, for a limited time, would move between bargaining units. But this circumstance does not, in our opinion, so clearly violate the NMB's order as to require our dismissal of the petitions for arbitration.<sup>5</sup>/ We

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<sup>5</sup>/ Pan American acknowledged that the craft structure established by the NMB could have created some anomalies for National employees. On the other hand, the IBT integrated seniority list calculates the seniority for the former National stock clerks and station agents entirely on the basis of their seniority

prefer to have the arbitrator resolve this issue, particularly since the arbitrator will be more experienced in labor law matters than we are. Our preference for having the arbitrator resolve this issue if fully consistent with the reasoning of the Court of Appeals in its recent decision in Pan American World Airways v. CAB, D.C. Cir. No. 81-1963 (decided July 23, 1982). The Court, quoting Air Line Employees Ass'n v. CAB, 413 F.2d 1092, 1095 (D.C. Cir. 1969), pointed out that the Board's imposition of LPP's has not transformed us into a labor board "bound to pass on every question of labor law which might arise out of a merger," and, citing American Airlines v. CAB, 445 F.2d 891, 895 (2d. Cir. 1971), cert. den-

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in these classifications and excludes any seniority they may have gotten in any other job classification. On the surface this seems inconsistent with IBT's claim that TWU must recognize the station agents' seniority as ramp agents.

ied, 404 U.S. 1015, held that we "may properly decide that [our] scarce resources should be husbanded for the tasks for which [we] consider [ourselves] to be expert, rather than frittered away in an area more suitable for an experienced labor arbitrator." The Court accordingly concluded that "the Board is fully entitled -- and indeed expected -- to rely on the expertise of an arbitrator to settle disputes that at least arguably arise under the LPP's" (slip op., pp. 9-10). This analysis by the Court fully supports our decision to have the arbitrator rule on the claims by Pan American and TWU that the claims made by IAM and IBT would violate the NMB's decision.

We conclude as well that the establishment of integrated seniority lists for the employees within the TWU and IBT units also does not preclude the holding

## A 29

of an arbitration proceeding. We doubt that the establishment of those lists necessarily cut off the claims now made by IAM and IBT. Pan American and TWU are, of course, free to argue that the resolution of the seniority lists within each unit would make it unfair and inequitable to give the station agents and stock clerks seniority rights in the ramp agent/cleaner job classification.

The only difficulty raised in our minds by this proceeding is IAM's standing to pursue LPP arbitration for employees now represented by another union at the merged carrier. However, since that union, IBT, fully acquiesces in IAM's participation in the seniority dispute, we accord it party status in the LPP arbitration now ordered.

## A 30

Since the arbitration petitions involve common issues and no party opposes consolidation, we will consolidate the petitions.

ACCORDINGLY,

1. We consolidate and grant the petitions of International Association of Machinists and Aerospace Workers and International Brotherhood of Teamsters, Airline Division for orders directing arbitration under the labor protective provisions in Pan American-Acquisition Of Control Of And Merger With National, Docket 33283;

2. We order Pan American World Airway, Inc., and Transport Workers Union of America, AFL-CIO, within 30 days of the date of service of this order, to participate with petitioners, jointly, in the selection of an arbitrator pursuant to section 13(a) of the labor protective

## A 31

provisions for the purpose of arbitrating the claims set forth in the petitions.

The arbitration shall be conducted in conformance with section 13(a) of the labor protective provisions: Provided, however, that nothing in this order shall preclude the parties, jointly, from agreeing to proceed pursuant to section 13(b) of the labor protective provisions within the 30-day period;

3. We order the determination of the arbitrator to be final and binding on the parties to the arbitration;

4. We order Pan American World Airways, Inc., upon receipt of the arbitrator's award to file two copies of the award in C.A.B. Dockets 33283, 39974, and 40033, respectively; and

5. We retain jurisdiction to take such action as may be necessary or appropriate in the public interest.

**A 32**

**By the Civil Aeronautics Board:**

**PHYLLIS T. KAYLOR**

**Secretary**

**(SEAL)**

**All Members concurred.**



# A 33

Order 82-12-62

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board  
at its office in Washington, D.C.,  
on the 16th day of December, 1982

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In the matter of :  
 :  
PAN AMERICAN-ACQUISITION OF :  
AND MERGER WITH NATIONAL :  
(Docket 33283) :  
 :  
Petition of International : Docket  
Association of Machinists : 39974  
and Aerospace Workers to :  
compel arbitration. :  
 :  
Petition of International : Docket  
Brotherhood of Teamsters, : 40033  
Airline Division to compel :  
arbitration. :  
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## ORDER ON RECONSIDERATION

By Order 82-8-63 (August 13, 1982) the  
Board directed arbitration of a seniority  
integration dispute between the Interna-  
tional Association of Machinists and  
Aerospace Workers (Machinists) and the

## A 34

International Brotherhood of Teamsters, Airline Division (Teamsters), on the one hand, and the Transport Workers Union (TWU) and Pan American World Airways (Pan Am), on the other. The dispute grew out of Pan Am's merger with National Airlines, a merger which we approved in Orders 79-12-163/164/165 subject to labor protective provisions (LPP's). After we granted the petitions by the Machinists and the Teamsters for an arbitration of the dispute, TWU sought judicial review of our decision, Transport Workers Union v. CAB, D.C. Cir., No. 82-2080 (filed September 15, 1982).

Almost two months after the deadline for seeking reconsideration of our order, Pan Am filed a petition for reconsideration and a motion for leave to file the petition late. TWU filed a response supporting Pan Am's request while the Machi-

## A 35

nists and the Teamsters each filed answers opposing reconsideration and opposing Pan Am's motion for leave to file the petition. Pan Am also requested us to stay our order directing arbitration until we acted on its petition for reconsideration. The TWU supported Pan Am's stay motion, and the Machinists and the Teamsters opposed it.

We believe that Pan Am's petition for reconsideration was filed inexcusably late, for none of the reasons given by Pan Am show good cause for its failure to file a timely petition. We would dismiss it on that ground had no one sought judicial review of our order. However, since the same arguments made in the petition may be made by Pan Am before the Court, we have decided to accept Pan Am's petition so that the Court will have the assistance of our views on Pan Am's argu-

## A 36

ments. After considering Pan Am's arguments on the merits we have determined to deny reconsideration.

The Machinists and the Teamsters sought arbitration to reestablish certain seniority and bumping rights claimed by some former National employees. National's cleaners and stock clerks were within the same bargaining unit and represented by the Machinists. National's station agents and ramp agents were in another unit represented by the Air Line Employees Association (ALEA). Many of the employees within each unit had worked in both types of job within the unit and could use their accrued seniority for each type of job; thus, for example, a station agent who had worked as a ramp agent could use his ramp agent seniority to bid for that type of job if he were laid off as a station agent.

## A 37

When National was merged into Pan Am, however, these employees lost their ability to use their accrued seniority in a second job classification. The National employees became subject to Pan Am's bargaining unit structure. At Pan Am the stock clerks share a unit with the station agents, not the cleaners, and are represented by the Teamsters. The ramp agents and cleaners are in a unit represented by the TWU. Pan Am's maintenance of its premerger bargaining structure was consistent with a ruling by the National Mediation Board (NMB), the agency which under the Railway Labor Act has the exclusive jurisdiction for determining the class or craft composition of airline employee bargaining units. After the merger Pan Am assigned each of the former National cleaner/stock clerks and station agents/ramp agents to a job classifica-

## A 38

tion according to the employee's predominant duties at National. Because of the difference in Pan Am's bargaining unit structure, these employees were now in units which did not include their other National job classification. The bargaining representatives at Pan Am, the Teamsters and the TWU, each negotiated an agreement with Pan Am to integrate the seniority lists for its unit. See Orders 82-8-65 (August 16, 1982) and 82-3-16 (March 4, 1982), pet. for review pending sub nom. P.A.I.N. v. CAB, D.C. Cir. No. 82-1496 (filed May 3, 1982). Under these agreements, however, the National employees could not use their accrued seniority in their second job classification; the station agents, for example, who had ramp agent seniority could not bid for ramp agent positions as those positions were in a different bargaining unit covered by

## A 39

a seniority integration agreement which gave workers outside the unit no seniority credit.

This caused the Machinists and the Teamsters to petition for an arbitration under sections 3 and 13 of the LPP's<sup>1</sup>/ They sought to reestablish for a time the seniority rights that National's stock clerks and station agents had, respectively, in the cleaner and ramp agent

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1\_/ "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

"Section 13(a). In the event that any dispute or controversy \* \* \* arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator \* \* \*. The decision of the arbitrator shall be final

## A 40

classifications. We granted their petition over the objections of Pan Am and the TWU, who primarily argued that such an arbitration proceeding would undermine the NMB's decision on Pan Am's bargaining unit structure. We recognized that the relief sought by the Machinists and the Teamsters might cause some employees to move into a new bargaining unit. We concluded, however, that "this circumstance does not, in our opinion, so clearly violate the NMB's order as to require our dismissal of the petitions for arbitration," Order 82-8-63, p. 4. We stated our preference for having the arbitrator decide the issue, "particularly since the arbitrator will be more experienced in labor law matters than we are." As we noted, our preference for having the arbitrator decide the issue was "fully consistent" with the Court's recent decision



## A 41

in Pan American World Airways v. CAB, D.C. Cir. No. 81-1963 (decided July 23, 1982), which affirmed a Board order directing arbitration of another LPP dispute.

Pan Am's petition for reconsideration essentially argues again that the holding of an LPP arbitration proceeding here would violate the NMB's jurisdiction. Pan Am asserts that the Board should not proceed without first requesting the NMB's opinion on whether the Board's action would violate that agency's jurisdiction.

We would be pleased if the NMB offered its opinion in this proceeding, we see no reason for delaying the arbitration by suspending it while we ask the NMB for its views. Pan Am states that it believes that the NMB will give its opinion if asked by the Board but fails to pro-

## A 42

vide any foundation for this statement. Neither Pan Am nor the TWU, which supports Pan Am, say that the NMB will only give its opinion if the Board asks for it. Neither Pan Am nor the TWU states that it has made any effort on its own to obtain the views of the NMB.

Accordingly, we will not delay the arbitration proceeding in order to request the NMB's opinion. However, we made it quite clear in our earlier order that the arbitrator should consider the jurisdictional arguments made by Pan Am and the TWU.<sup>2</sup>/ Pan Am and the TWU, moreover, remain free to ask the NMB to provide its views for the arbitrator's benefit, al-

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<sup>2</sup>/ Pan Am asserts without explanation that the arbitrator has no authority to rule on issues of law and therefore may not rule on the issue of the scope of the NMB's jurisdiction. This assertion is unsupported by Board precedent and practice.

## A 43

though their doing so should not be allowed to cause any undue delay in the arbitration proceeding.

We remain unpersuaded, moreover, by Pan Am's argument that the relief sought by the Machinists and the Teamsters will inevitably violate the NMB's jurisdiction. Pan Am and the TWU have construed that relief as an attempt to change the boundaries of the bargaining units. The relief requested, however, would not affect those boundaries. Instead, it would merely enable some employees to use their accrued seniority to obtain jobs in the TWU unit, a step which would cause them to become represented by that union instead of the Teamsters. This result on its face does not appear to infringe on the NMB's jurisdiction. According to the Machinists, there are a number of cases

where employees hold seniority in different bargaining units subject to NMB jurisdiction.

Our conclusion on this issue is supported by one of the cases cited by Pan Am, United Transportation Union v. Burlington Northern, 332 F. Supp. 486 (D. Minn., 1971), aff'd, 470 F.2d 813 (8th Cir., 1972). That case concerned a dispute between two railroad unions over determining the seniority of firemen, some of whom also worked as engineers. The fireman and engineer crafts were represented by different unions. The firemen's union sued the railroad to enjoin it from carrying out an agreement with the engineers' union which allegedly breached the railroad's contract with the firemen's union. The district court refused to take jurisdiction on two grounds. First, the court ruled that the

## A 45

dispute in essence was a jurisdictional dispute over which union had the representational authority to bargain with the railroad on the seniority issue. As a result, only the NMB could resolve the matter. Secondly, the court held that the contract issues could only be heard by the National Railroad Adjustment Board, for the federal courts had no jurisdiction over such issues. Pan Am, of course, relies on the case for the judge's first holding. However, while the court of appeals affirmed the district court's decision to decline jurisdiction, it did so only on the second ground given by the district court. The court of appeals expressly held that the dispute was not a jurisdictional dispute and further expressed its view that the dispute should be settled in a proceeding in which both unions participated. That

result is in effect the same one which our order directing arbitration may achieve here.<sup>3</sup>/

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3\_/ The Eighth Circuit's decision in the United Transportation Union case appears to be consistent with Brotherhood of Locomotive Firemen & Enginemen v. NMB, 410 F.2d 1025 (D.C. Cir., 1969), but inconsistent with Brotherhood of Locomotive Firemen v. Seaboard Coast Line R.R., 413 F.2d 19 (5th Cir., 1969), cert. denied, 396 U.S. 963. We prefer to have the arbitrator decide which of the cases should be followed here, as he will have more expertise in labor law matters.

The other cases cited by Pan Am on the NMB jurisdictional issue all involve situations where the dispute clearly involved a dispute over a union's right to represent certain groups of employees, although some also involved contract enforcement issues. See General Comm. of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943); Brotherhood of Railway and Steamship Clerks v. United Air Lines, 325 F.2d 576 (6th Cir., 1963); Air Line Pilots Ass'n v. Texas International Airlines, 656 F.2d 16 (2d Cir., 1981). Since neither the Machinists nor the Teamsters make any claim that they should be able to represent anyone in the TWU bargaining unit, these cases are obviously not in point here.

## A 47

Pan Am's other objections to our order are easily disposed of. First, it claims we should defer to the greater expertise of the NMB and not attempt to decide the seniority dispute. As shown, however, that dispute does not necessarily appear to involve matters within the NMB's jurisdiction (or expertise), and that agency has not expressed any opinion on this proceeding. If the NMB does express an opinion, however, we assume that the arbitrator will treat it with great respect.

Pan Am next asserts that the seniority claims made by the Machinists and the Teamsters essentially involve claims to enforce rights under National's labor contracts. Since those contractual rights were assertedly extinguished by Pan Am's new collective bargaining agreements, there is no longer any basis for

the seniority rights asserted by the Machinists and the Teamsters. This argument misconstrues the source of the seniority claims made by the Machinists and the Teamsters. Their source is not the collective bargaining agreements but the LPP's provision that the seniority lists of the two carriers must be integrated in a fair and equitable manner. We may enforce that provision whatever the terms of Pan Am's current labor contracts. See Kent v. CAB, 204 F.2d 263, 266 (2d Cir., 1953) ("A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers \* \* \* only upon such terms as it determines to be just and reasonable in the public interest"); American Airlines v. CAB, 445 F.2d 891, 896 (2d Cir., 1971), cert. denied, 404 U.S. 1015; Int'l Ass'n of Machinists



v. Northeast Airlines, 536 F.2d 975, 977 (1st Cir., 1976), cert. denied, 429 U.S. 961. Pan Am and the TWU remain free, of course, to argue to the arbitrator that the relief sought by the Machinists and the Teamsters should be denied because it would unduly interfere with the TWU's collective bargaining agreement.

Pan Am also asserts that the Machinists and the Teamsters have no standing to represent Pan Am employees who seek to bid for jobs within the TWU unit. This assertion has no merit, for it seems to assume that the Machinists and Teamsters are trying to represent employees within the TWU unit. As shown, that assumption is false.

Pan Am claims it has fully satisfied its duty to arrange a fair and equitable integration of seniority lists by having separately agreed upon such lists with

## A 50

the representatives of the applicable bargaining units, the Teamsters and the TWU. Although Pan Am is correct in saying that no one has accused it of bad faith in negotiating those agreements on seniority integration, the parties whose bargaining led to those agreements did not appear to resolve the issue of the seniority rights allegedly held by some employees represented by the Machinists and the Teamsters. Thus those agreements can not be considered a final resolution of the seniority issue. Here again, however, the arbitrator should consider the claims of Pan Am and the TWU that it would be unfair and inequitable to establish seniority rights for the Teamsters' members for jobs in the TWU unit in view of the fact that Pan Am and the TWU nego-

tiated in good faith an integrated seniority list which has been in effect for two years.

Pan Am's petition included an affidavit of its System Director-Labor Relations, who alleged that the relief sought by the Machinists and the Teamsters could be extraordinarily costly for Pan Am. His affidavit states that Pan Am has been using the seniority lists negotiated with the TWU and the Teamsters for over two years and has made numerous layoff decisions according to those lists. If Pan Am were found liable for back pay for the layoffs made in reliance on these lists, Pan Am would be potentially liable for over \$9 million, an amount which Pan Am can not afford in its present financial condition. This potential injury to Pan Am is not a basis for denying arbitration, but it is a factor that the arbi-

trator can consider in determining whether any relief should be awarded to the Machinists and Teamsters.<sup>4</sup>/

Finally, Pan Am has asked that we stay our order directing arbitration pending our decision on its petition for reconsideration. This order will clearly moot Pan Am's stay request, but a stay would appear unwarranted in any event. Cf. Order 81-8-99 (August 17, 1981).

ACCORDINGLY,

1. We grant the motions of Pan American World Airways, the International Association of Machinists and Aerospace Workers and the International Brotherhood of Teamsters, Airline Division, for leave to file unauthorized documents; and

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<sup>4</sup>/ The Board, however, has not in the past awarded back pay, at least on a significant scale, in seniority integration disputes.

## A 53

2. We deny the petition for reconsideration and motion for stay filed by Pan American World Airways.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR

Secretary

(SEAL)

All Members concurred.



EXTRACTS OF ORAL ARGUMENT BEFORE THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

[page 16 line 18 to page 17 line 17]

[Mr. Ray appearing for the CAB] On the National Mediation issue, again, that was one issue that the Board said that the arbitrator should consider. The Board said if the National Mediation Board wanted to submit its views to the arbitrator, the arbitrator should give them careful consideration.

I might note in that regard that the National Mediation Board so far has never filed anything with the Board indicating any interest in this case whatsoever.

QUESTION: Is it customary to do that?

MR. RAY: Your Honor, this is kind of an unusual case. This is the only case of which I am aware of where there has

been a dispute between unions, where one party has claim that there was National Mediation Board jurisdiction involved.

However, the Board many years ago --

QUESTION: I thought that was usual.

MR. RAY: No, Your Honor. What usually happens is that --

QUESTION: Two unions fighting over jurisdiction.

MR. RAY: No, Your Honor, that's not true. Usually, you will have a situation where one carrier's workforce is represented by one union, the second carrier's workforce is represented by another union, and the carriers, say, will work out a list with one union and the second union will object and then we will send it to arbitration.



[page 18 line 14 to page 19 line 10]

[Mr. Ray appearing for the CAB] The Transport Workers Union and Pan American, in objecting to the arbitration order, have given no reason why it was improper for the Board to have referred the National Mediation Board question to arbitration. And it is a little hard to see why it would be improper for the Board to do that because, as the Transport Workers Union said several times in the course of their reply brief, we don't have much labor law expertise.

It seems to me it would be reasonable for every body, and it was certainly proper for the Board to do this, to decide that a question which appears to be as complicated as this should be decided by somebody with some expertise in the area.

QUESTION: You just said then that it is proper for the National Mediation Board -- the CAB to refer a National Mediation Board question for their decision. Is that what you said?

MR. RAY: Yes, Your Honor, unless -- if the carrier and the Transport Workers Union had clearly shown that the relief sought by the Machinists and the Teamsters would violate the National Mediation Board jurisdiction, then I suppose it would have been improper for the Board to do that.

